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Arbitration on the American Continent

ON December 10, 1928, the Latin American States will send delegates to participate in a conference in Washington on arbitration and conciliation summoned by Secretary of State Kellogg. The proposed conference is the direct outcome of a resolution adopted at the Sixth Pan American Conference, held at Havana, Cuba, in January-February, 1928. The resolution was adopted following an animated discussion of the report on the pacific settlement of international disputes presented on February 13 by M. Alfaro of Panama. The report reviewed the project formulated by the Commission of Jurists at Rio de Janeiro in 1927. In addition, M. Alfaro submitted a project providing for submission to arbitration of all disputes except those which involve the constitutional provisions or jeopardize the independence of a State. In the course of the discussion the interpretation of these exceptions received particular consideration. It is expected that the task of the forthcoming conference will consist chiefly in the determination of the spheres of arbitration and conciliation and in the coordination of existing machinery for the pacific settlement of international disputes.

The resolution adopted at Havana reads as follows:

"The Sixth International Conference of American States,

"RESOLVES:

"Whereas the American Republics desire to express that they condemn war as an instrument of national policy in their mutual relations; and

"Whereas the American Republics have the most fervent desire to contribute in every possible manner to the development of international means for the pacific settlement of conflicts between states:

"1. That the American Republics adopt obligatory arbitration as the means which they will employ for the pacific solution of their international differences of a juridical character.

"2. That the American Republics will meet in Washington within the period of one year in a conference of conciliation and arbitration to give conventional form to the realization of this principle, with the minimum exceptions which they may consider indispensable to safeguard the independence and sovereignty of the states, as well as matters of a domestic concern, and to the

exclusion also of matters involving the interest or referring to the action of a state not a party to the convention.

"3. That the governments of the American Republics will send for this end plenipotentiary jurisconsults with instructions regarding the maximum and the minimum which they would accept in the extension of obligatory arbitral jurisdiction.

"4. That the convention or conventions of conciliation and arbitration which may be concluded should leave open a protocol for progressive arbitration which would permit the development of this beneficent institution up to its maximum.

"5. That the convention or conventions which may be agreed upon, after signature, should be submitted immediately to the respective governments for their ratification in the shortest possible time."[1]

This resolution will provide the basis for the discussions of the forthcoming conference.

THE RECORD OF LATIN AMERICA

To what extent has the principle of arbitration been accepted by the Latin American States in their relations with each other and with the United States, and under what circumstances has it been applied? The answers to these questions must be sought in the records of the Pan American and Central American conferences; in the arbitration treaties of the United States and of the Latin American States; and in the cases which have actually been submitted to arbitration.

The principle of arbitration has nowhere received such wholehearted support as in Latin America. The uncertain boundaries of the Spanish possessions in America, and the desire of the republics which succeeded to the Spanish dominions to define their respective interests, created an immediate necessity for the arbitration of disputes concerning boundaries and the rights of navigation. Resort to arbitration has been facilitated by the similar political experience and the uniform legal traditions of the Latin American States.

As soon as the new republics had established their independence, they turned their attention to the pacific settlement of disputes which might arise between them. The Congress of Panama, summoned in 1826 at the suggestion of Bolivar, discussed arbitration and conciliation, without arriving at concrete decisions. Mediation and arbitration were provided for in the still-born projects of the Congresses of Lima, 1848 and 1864.

ARBITRATION AND THE PAN AMERICAN CONFERENCES

The First Pan American Conference, which met in Washington in 1889, under the auspices of the United States, declared arbitration to be a principle of "American international law."[2] A plan of arbitration was adopted, providing for the compulsory arbitration of all controversies regarding diplomatic and consular privileges, boundaries, territories, indemnities, the right of navigation, and the validity, interpretation and execution of treaties, and any other controversies, whatever their origin, nature or object, with the sole exception of those which, in the judgment of one of the States involved in the controversy, might imperil its independence; but, even in that case, while arbitration for that State was to be optional, it was to be compulsory for the other party. The conference also adopted a resolution recommending arbitration to the European States.

The very broad plan of arbitration adopted at this conference received the enthusiastic support of the United States, but was rejected by several important Latin American States and in consequence was finally abandoned.

The Second Pan American Conference, held in Mexico City in 1901, adopted the project of a treaty which provided for the arbitration of all disputes, with the exception of those which, in the opinion of one of the parties, affect its independence or national honor. Controversies regarding diplomatic privileges, boundaries, the right of navigation, the validity, interpretation and execution of treaties were declared not to affect independence or national honor. The United States refused to become

1. Report of the Delegates of the United States to the Sixth Pan American Conference, Washington, 1928. p. 310.

2. Carbonell, N. *Las Conferencias Internacionales Americanas*, Havana, 1928, p. 100.

a party to this treaty, apparently out of opposition to the practice of compulsory arbitration. The States represented at the conference, including the United States, signed a protocol expressing their adherence to the Hague Convention of 1899 for the Pacific Settlement of International Disputes.

This conference also adopted a convention providing for the submission of private pecuniary claims to arbitration.

The Third Pan American Conference, which met in Rio de Janeiro in 1906, contented itself with a resolution, communicated to the Hague Conference of 1907, expressing the adherence of the States represented at the conference to the principle of arbitration. At this time it was expected that the Hague Conference would adopt a general treaty of arbitration, providing for the pacific solution of all international conflicts.

The Hague Conference, 1907, adopted a convention for the pacific settlement of international disputes, which provides for good offices, mediation, commissions of inquiry and arbitration. Article 38 of the convention provides that "in questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting Powers as the most effective, and at the same time, the most equitable means of settling disputes which diplomacy has failed to settle." This conference also adopted a convention respecting the limitation of the employment of force for the recovery of contract debts. Under the terms of this convention the parties undertake "not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due its nationals." Nevertheless, this undertaking does not apply "when the debtor State refuses or neglects to reply to an offer of arbitration, or after accepting the offer, prevents any *compromis* from being agreed on, or after the arbitration, fails to submit to the award."

The Fifth Pan American Conference,[3] held in Santiago in 1923, reiterated the belief that arbitration was a principle of "American international law," expressed the hope that compulsory arbitration would continue to spread on the American continent, and referred to the Commission of Jurists a project presented by Costa Rica for the creation of a Permanent American Court of Justice. This conference also adopted the Gondra treaty, providing for the submission of all disputes, except those affecting the constitutions of the parties having no general treaties of arbitration, to commissions of inquiry. The United States is a party to this treaty.[4]

In accordance with the action taken by the Fifth Pan American Conference, the Commission of Jurists formulated the project of a convention for the pacific settlement of international disputes at Rio de Janeiro in 1927. This project formed the basis for the one submitted by M. Alfaro to the Sixth Pan American Conference at Havana in 1928.

It will be seen that the broad commitments proposed by the First Pan American Conference, supported by the United States and rejected by leading Latin American States, have been gradually whittled down at subsequent conferences by means of specified exceptions.

ARBITRATION AND THE CENTRAL AMERICAN REPUBLICS

The Central American republics have taken additional steps to secure the pacific settlement of disputes arising between them. The Central American Conference which met in Washington in 1907 under the auspices of the United States adopted a treaty providing for the establishment of a permanent arbitral tribunal — the Central American Court. This court was abandoned in 1917 as a result of the rejection by Nicaragua of the court's award regarding the Bryan-Chamorro treaty.[5] The Central American Conference of 1923 adopted a treaty providing for the establishment of the International Central American Court, which is similar in character to the Hague Court,

3. Arbitration was not on the Agenda of the Fourth Pan American Conference.

4. Cf. Appendix for the list of States which have ratified the treaty or adhered to it.

5. Cf. *Information Service*, Vol. II, No. 24, *United States Policy in Nicaragua*.

being a panel from which judges are to be selected in each case by the States parties to the dispute. This conference also adopted a convention to which the United States is a party, providing for the submission of disputes "originating in some divergence of opinion regarding questions of fact" to a commission of inquiry to be constituted separately for the examination of each dispute as it occurs. Questions affecting sovereignty, independence, honor and vital interests are specifically excluded.[6]

LATIN AMERICA RESORTS TO ARBITRATION

The Latin American States have been ready to accept broad commitments in their relations with each other. The constitutions of Brazil, Venezuela and the Dominican Republic provide for the submission of all international disputes to arbitration before resort is made to war.[7] A number of Latin American treaties provide for the compulsory arbitration of all disputes which may arise between the contracting parties.[8]

Only five Latin American States have arbitration treaties with the United States —Brazil, Ecuador, Haiti, Peru and Uruguay. These treaties, concluded by Secretary Root in 1908-09 and automatically extended, provide for the arbitration of differences of a legal nature and of differences relating to the interpretation of treaties existing between the contracting parties, provided that they do not affect the vital interests, the independence, or the honor of the parties, and do not concern the interests of third States.

All the Latin American States, with the exception of Brazil, Ecuador and Mexico, are at present members of the League of Nations.[9] By their acceptance of the Covenant, they have pledged themselves to submit disputes to arbitration or judicial settlement, and in the last resort to conciliation by the Council. Brazil, Costa Rica, the Dominican Republic, Panama, Salvador and Uruguay have signed, but have not yet ratified, the optional clause concerning the compulsory jurisdiction of the Permanent Court of International Justice, on condition of reciprocity. Haiti has signed the clause unconditionally and has ratified it.

In practice, the Latin American States have readily resorted to arbitration. Disputes between them concerning boundaries and the rights of navigation have been submitted to single arbitrators (heads of States or distinguished jurists, European and American),[10] or to specially selected arbitral tribunals. Disputes between them and the United States or European States regarding the reparation to be made for injuries to aliens or their property have usually been submitted to claims commissions, two members of which are named by each party, a third member being selected by the other two with the consent of the governments involved. Finally, three Latin American States have appeared before the Permanent Court of Arbitration at the Hague in important controversies with the United States and with European States.[11]

In at least three instances arbitral awards have been questioned by Latin American States. In the Cerruti affair between Colombia and Italy, 1897, Colombia, while admitting her liability, questioned the amount of the indemnity prescribed by the award of the President of the United States. The dispute was finally adjusted by diplomatic means. In 1914 Panama refused to abide by the award of Chief Justice White in its boundary dispute with Costa Rica. Mr. Hughes was instrumental in securing the adjustment of this dispute in 1921. Nicaragua, in 1917, rejected the awards rendered by the Central American Court in favor of Costa Rica and Salvador.

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6. Cf. Appendix for list of States which have ratified this convention.

7. A similar provision is found in the Portuguese Constitution of 1911.

8. Cf. Appendix.

9. Costa Rica, which had withdrawn, is now being reinstated as a member of the League. Argentina has decided to discontinue the payment of dues to the League.

10. To name only a few recent cases: the Panama-Costa Rica boundary dispute was submitted to President Loubet in 1900 and to Chief Justice White in 1914; the Tacna-Arica dispute was submitted to the President of the United States in 1922; the Colombia-Venezuela dispute was submitted to the Swiss Federal Council in 1917.

11. Mexico (Pious Funds of California, decided 1902); Venezuela (rights of preference claimed by blockading powers, decided 1904; claims of the "Orinoco" Company, decided 1910); Peru (Canevaro claim, decided 1912; French claims against Peru, decided 1921).

THE RECORD OF THE UNITED STATES[12]

The arbitration record of the United States, in order to be interpreted correctly, must be studied in conjunction with its record in the sphere of conciliation, as revealed in its relations both with Latin American and with European States.

The United States reintroduced arbitration into modern statecraft by the Jay treaty of 1794 with Great Britain, which provided for examination by three commissions of certain specific points at issue between the parties; this treaty had no application to controversies which might arise in the future.

The treaty of Guadalupe-Hidalgo, 1848, between the United States and Mexico, contained a clause providing for voluntary arbitration of future disputes. The clause has not been invoked in any one of the several disputes which have arisen between the United States and Mexico. Some disputes have been submitted to arbitration by means of special treaties.

Arbitration has always been advocated in the United States, but in practice the arbitration treaties concluded by this country have been limited in scope. The Olney-Pauncefote treaty of 1897, which provided for the submission to arbitration of all differences between the parties, was first so amended by the Senate as to lose its original meaning, and finally failed of ratification. The treaties of 1904-1905, sponsored by President Roosevelt, were so drastically amended by the Senate that the President refused his approval. The Root treaties of 1908-1909, which excepted from arbitration disputes affecting the vital interests, the independence, or the honor of the contracting parties, and those concerning the interests of third States, alone secured ratification. The Taft treaties of 1911, providing for the arbitration of "justiciable" disputes, were amended by the Senate, and finally abandoned by the President.

The United States played a leading part at the Hague Conferences, 1899 and 1907. It gave its support to the establishment of the Permanent Court of Arbitration at the Hague—a panel of judges from which the parties to a dispute may select arbitrators.

In 1913-1914 Secretary Bryan negotiated a series of "cooling-off" treaties, providing for the submission of all disputes of every nature whatsoever to an international commission for investigation and report. The commissions established under these treaties are permanent in membership, so that questions may be referred to them without the formality of selecting individuals to serve on them when the conflict occurs. Of the twenty-one such treaties in force, eleven are with Latin American States.[13]

After 1919 the United States concluded two treaties on the model of the Root treaties—with Sweden, 1924, and Liberia, 1926. In 1928 Mr. Kellogg negotiated new arbitration treaties designed to take the place of the Root treaties. The treaty with France, on which the other treaties are modeled, states in the preamble that the parties have decided "to conclude a new treaty of arbitration enlarging the scope of the arbitration convention signed at Washington on February 10, 1908." The new treaty provides for the submission of "justiciable" disputes to arbitration. The provisions of the treaty, however, "are not to be invoked in respect of any dispute the subject matter of which

"(a) is within the domestic jurisdiction of either of the High Contracting Parties,

"(b) involves the interests of third parties,

"(c) depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine,

"(d) depends upon or involves the observance of the obligations of France in accordance with the covenant of the League of Nations."

It will be noted that the time-honored phrase, "vital interests, independence and honor" is abandoned in this treaty; the new exceptions introduced, however, may in practice prove to be equally far-reaching.

At the present time, the treaties of the United States except from arbitration disputes affecting vital interests, independence and national honor (the Root treaties

12. For a more detailed discussion, cf. *Information Service*, Vol. III, No. 7, *International Arbitration and Plans for an American Locarno.*

13. Bolivia, Brazil, Chile, Costa Rica, Eucador, Guatemala, Honduras, Paraguay, Peru, Uruguay, Venezuela.

still in force) and disputes affecting domestic questions and the Monroe Doctrine (the Kellogg treaties). Both groups of treaties provide for the exception from arbitration of disputes affecting the interests of third States.

The Bryan treaties, in addition, provide for the submission of all disputes to international commissions for investigation and report. By an exchange of notes the United States has made it clear that the exceptions from arbitration contained in its treaty with France, 1928, do not affect the provisions of the Bryan treaty with that country.

It is important, in a discussion of the position of the United States with regard to arbitration, always to keep in mind the fact that the arbitration treaties concluded by this country do not stand alone: they are in many cases supplemented by, and must then be viewed in connection with, the Bryan conciliation treaties. In a number of cases, also, the United States has Bryan treaties with countries with which it has concluded no arbitration treaties.

THE LOCARNO TREATIES

The Locarno treaties, 1925, which embody the most advanced principles of pacific settlement, make the following provisions:

> "ARTICLE 1. All disputes of every kind between . . . with regard to which the Parties are in conflict as to their respective rights, and which it may not be possible to settle amicably by the normal methods of diplomacy, shall be submitted for decision either to an arbitral tribunal or to the Permanent Court of International Justice. It is agreed that the disputes referred to above include in particular those mentioned in Article 13 of the Covenant of the League of Nations.
>
> "This provision does not apply to disputes arising out of events prior to the present Convention and belonging to the past. . .
>
> "ARTICLE 2. Before any resort is made to arbitral procedure or to procedure before the Permanent Court of International Justice, the dispute may, by agreement between the Parties, be submitted, with a view to amicable settlement, to a permanent international commission styled *the Permanent Conciliation Commission*, constituted in accordance with the present Convention.
>
> "ARTICLE 3. In the case of a dispute the occasion of which, according to the municipal law of one of the Parties, falls within the competence of the national courts of such Party, the matter in dispute shall not be submitted to the procedure laid down in the present Convention until a judgment with final effect has been pronounced, within a reasonable time, by the competent national judicial authority.
>
> "ARTICLE 17. All questions on which the . . . Governments shall differ without being able to reach an amicable solution by means of the normal methods of diplomacy the settlement of which cannot be attained by means of a judicial decision as provided in Article 1 of the present convention, and for the settlement of which no procedure has been laid down by other conventions in force between the Parties, shall be submitted to the Permanent Conciliation Commission, whose duty it shall be to propose to the Parties an acceptable solution and in any case to present a report."

The Locarno treaties provide for the submission to arbitration of disputes which may be described as legal. In the provision made for conciliation, they are identical with the Bryan treaties. In the provision for judicial settlement, they go beyond the existing treaties of the United States.

The Committee on Arbitration and Security of the League of Nations submitted to the Assembly in September 1928 three "model" arbitration and conciliation conventions, varied in scope, which are intended to supplement the Locarno treaties.[14]

The "model" conventions attempt to differentiate between "legal" and "non-legal" disputes—the former to be submitted to arbitration or judicial settlement, the latter to conciliation. In accepting any one of these conventions, the contracting parties may specifically exclude certain matters from arbitration, such as

> "(a) Disputes arising out of facts prior to the accession;
>
> "(b) Disputes concerning questions which by international law are solely within the domestic jurisdiction of States;
>
> "(c) Disputes concerning questions which affect the principles of the constitution of the State;
>
> "(d) Disputes concerning particular clearly specified subject matters, such as territorial status."

Such matters, however, will remain susceptible of submission to conciliation unless there is a special stipulation to the contrary. Moreover, the application of the

14. Report of the Committee on Arbitration and Security on the work of its Third Session, Geneva, July 5, 1928.

possible reservations is not left to the discretion of the parties; it is subject to control by the Permanent Court of International Justice. The Assembly has adopted a resolution recommending the acceptance of the rules established by these conventions by all States, whether members of the League or not.

The operation of the "model" conventions, should they be generally accepted, would not be unlike that of the Kellogg and Bryan treaties combined. Arbitration is accepted with reservations; the reserved matters are left to settlement by means of conciliation.

In practice, the United States since 1794 has frequently resorted to arbitration. Several important disputes have been submitted to special arbitral tribunals—the Alabama claims, 1895; the Behring Sea case, 1895; the Alaska boundary dispute, 1903. The United States has resorted to the Hague Court in controversies with Latin American and European States.[15]

Boundary disputes have been arbitrated with Mexico, and private claims involving Chile, Colombia, Ecuador, Haiti, Mexico, Peru and Venezuela have been referred to claims commissions by special claims conventions.[16]

It will be seen that in its relations with Latin American States, the United States has shown itself ready to arbitrate boundary disputes and financial claims. No disputes between the United States and Latin American States, however, have yet been submitted to conciliation. Nor is the United States under obligation to submit disputes to the Permanent Court of International Justice, whose jurisdiction has been accepted by a number of Latin American States.

THE PROCEDURE AND SCOPE OF ARBITRATION

What is the present status of arbitration? What is its value as a method of pacific settlement of international disputes? In what respects is its procedure weak or ineffective? To what extent is it limited in scope? What attempts have been made to remedy its defects and to extend its scope? The answers to these questions must be sought in recent arbitration treaties, both in Europe and on the American continent.

THE ESSENTIALS OF ARBITRATION

Arbitration has been defined in the Hague Convention for the Pacific Settlement of International Disputes, 1907, as "the settlement of disputes between States by judges of their own choice and on the basis of respect for law."[17] The judicial nature of the arbitral award, rendered usually on the basis of existing international law, differentiates it, on the one hand, from such diplomatic measures as the offer of good offices and mediation, and, on the other, from the conclusions of conciliation commissions and commissions of inquiry, which are mere statements of facts or, at most, recommendations, and possess no binding character. At the same time, the procedure of arbitration, which leaves, in each case, the choice of judges to the States parties to the dispute, differentiates it from the submission of disputes to a tribunal such as the Permanent Court of International Justice, whose members are appointed once for all, and must act in each case that the parties choose to bring before the court.

Resort to arbitration may be voluntary or compulsory. Two or more States may voluntarily submit a dispute between them to arbitration by means of a special agreement, known as the *compromis*, which defines the subject-matter of the dispute, states the terms under which it is submitted, and designates the arbitrators. During the nineteenth century this procedure was the one which was usually followed. The disadvantage of this procedure is that, prior to arbitration, the parties to the dispute must agree to resort to arbitration, and this at a time when the

15. Pious Funds, 1902, (Mexico); the North Atlantic Fisheries, 1910 (Great Britain); the claims of the "Orinoco" Company, 1910 (Venezuela); Norwegian claims, 1922; the sovereignty of the Island of Palmas, submitted in 1925 (Netherlands).

16. The Convention of 1902 has never been invoked as the basis of arbitration.

17. The project of the Commission of Jurists contains the following formula (Article 19): "Arbitration has as its object the legal solution of conflicts by means of judges chosen by the interested parties."

relations between them are particularly strained.

Provision for compulsory arbitration was first made by means of an arbitral clause, special or general, inserted in treaties of friendship, commerce and navigation. Under the terms of such clauses, the contracting parties undertake the obligation to submit to arbitration some or all disputes which may arise regarding the execution or interpretation of the treaty. General arbitration treaties, by which the contracting parties bind themselves to submit to arbitration all disputes within certain stated categories are a more recent development. The most advanced arbitration treaties provide for the compulsory submission of all disputes, of whatsoever nature, to arbitration. Such treaties are usually concluded by States similar in political and economic development, or so situated that the probability of resort to war on their part is slight.[18]

THE PROCEDURE OF ARBITRATION

The procedure of arbitration consists in the determination of a difference between States through the decision of a single arbitrator or of an arbitral tribunal.

Usually, the parties to a dispute select the arbitrator or arbitrators who are to determine the dispute between them. The Permanent Court of Arbitration at the Hague and the International Central American Tribunal are not courts in the accepted sense of the term, but panels of judges from which the parties to a dispute may select arbitrators. The weakness of this system is that the choice of the arbitrators must be made by the parties at a moment when they are least in the mood for agreement. Inevitably their choice is swayed by the desire to secure, not so much an impartial tribunal, as one which will be prejudiced in their favor.[19]

The establishment of a permanent court, which would be selected without reference to the passions and prejudices of the moment, has been advocated as a remedy. The Central American Court, organized in 1907, was a permanent tribunal to which cases were to be referred as they arose. The Permanent Court of International Justice is intended to secure the continuity in the administration of international justice which is impossible under existing arbitral procedure.

Disputes are usually submitted to arbitration by means of an agreement—the *compromis*—in which the parties define the subject matter of the dispute, state the terms under which it is submitted, and designate the arbitrators The *compromis* is an international agreement, but is not, as a rule, subject to legislative control. Article II of the Kellogg treaty with France states the practice of the United States with regard to the conclusion of the *compromis:*

> "The special agreement in each case shall be made on the part of the United States of America by the President of the United States of America by and with the consent of the Senate thereof, and on the part of France in accordance with the constitutional laws of France."

Should the parties fail to agree, arbitration cannot take place, unless the arbitration treaty between them provides for alternative procedure. The procedure of arbitration is particularly weak at this point. Several post-war European treaties entrust the *compromis* to an independent authority,[20] to the arbitral tribunal itself,[21] or to the Permanent Court of Arbitration at the Hague.[22]

It is interesting to note that cases may be brought before the Permanent Court of International Justice either by the notification of a special agreement, or by a written application; in either case the subject of the dispute and the contesting parties must be indicated. Several post-war European treaties provide that a dispute may be submitted to the Permanent Court of International Justice on application by one of the parties. The States which have accepted the optional clause of the Statute

18. The earliest general arbitration treaties containing no exceptions from arbitration were concluded by Latin American States with each other and with Spain. Eleven such treaties are now in force between Latin American States; see Appendix. In Europe, prior to 1914, Denmark and the Netherlands became parties to such treaties.

19. Ralston, J. H. *The Law and Procedure of International Tribunals.* Stanford University Press, 1926, XXXI.

20. Usually the Permanent Conciliation Commission (Germany-Switzerland, 1921).

21. *E.g.* Poland-Czechoslovakia, 1925. The manner in which the arbitral tribunal is to be constituted in this eventuality is not made clear in these treaties.

22. *E.g.* Hungary-Switzerland, 1924.

of the Court regarding compulsory jurisdiction undertake to bring cases before the court without the formality of a special agreement.[23] A permanent tribunal vested with compulsory jurisdiction is obviously more effective than one whose jurisdiction States invoke only voluntarily.

In general, each State is sole judge of the nature of the dispute regarding which it will conclude a *compromis*, and which it will submit to arbitration. It undertakes to interpret for itself the reservations to arbitration which it has made in its treaties. Several post-war European treaties attempt to remedy this defect by providing that both parties must agree that a given dispute falls within the range of excluded differences, and that only then can the dispute be withheld from arbitration, and submitted to conciliation.[24] The "model" conventions drawn up by the Committee on Arbitration and Security of the League of Nations in 1928 provide that the operation of the reservations which may be made to these conventions is to be controlled, not by the parties to the dispute, but by the Permanent Court of International Justice.

The award of the arbitrators is final if the arbitration treaty does not stipulate the contrary, and is binding upon the parties. Obviously, the arbitral award is binding only provided the arbitrators have arrived at their decision in perfect independence, and have not been led into an essential material error.

It may be seen from this brief analysis that arbitration is at present particularly weak in three respects: the *ad hoc* selection of the arbitrators by the parties themselves; the practice of requiring a *compromis* before arbitral procedure can be set in motion; and the practice of permitting each State to be sole judge of the type of disputes it will submit to arbitration. The remedy for the first defect has been sought in the creation of a permanent arbitral tribunal; the remedy for the second—in the acceptance by the several States of the compulsory jurisdiction of such a tribunal; the remedy for the third—in the submission to the tribunal itself of the question whether or not a given dispute comes within its jurisdiction.

In order to determine whether all disputes are suitable for arbitration and, if not, what types, it is necessary to examine the present scope of arbitration.

THE SCOPE OF ARBITRATION

What is, at the present moment, the scope of arbitration? What disputes are considered suitable for arbitration? To what disputes is arbitration still inapplicable?

An analysis of arbitration treaties reveals the fact that differences of a "legal" nature or "justiciable in their nature by reason of being susceptible of decision by the application of the principles of law and equity"[25] are generally considered suitable for arbitration. According to the "model" conventions sponsored by the League of Nations, "legal" disputes are to be submitted to arbitration or judicial settlement. The Locarno treaties provide for the submission to arbitration or judicial settlement of disputes "with regard to which the parties are in conflict as to their respective rights." The Kellogg treaties provide for the submission of "justiciable" disputes to arbitration. In general, the terms "legal" and "justiciable" are understood to describe disputes susceptible of pacific settlement by the application of international law.

International law is contained only in part in specific documents, such as treaties, conventions, declarations, arbitral awards, etc., which constitute "written international law." In large part it still consists of practice, unwritten law, which constitutes what may be described as "customary in-

23. Belgium, unable to obtain a joint *compromis* in its dispute with China regarding the latter's denunciation of the Sino-Belgian Treaty of 1865, addressed in 1926 a unilateral application to the Permanent Court of International Justice, asking it to pass judgment on the dispute. Belgium and China *had previously agreed to accept as compulsory, ipso facto* and without special agreement, the jurisdiction of the Court in the classes of legal disputes set forth in Article 36 of the Statute of the Court. Belgium's application was brought under the terms of Article 36, which provides that "in the event of a dispute as to whether the court has jurisdiction in these cases, the matter shall be settled by a decision of the court." The case is still pending.

24. Germany-Switzerland, 1921; Hungary-Switzerland, 1921; Germany-Sweden, 1924; Germany-Finland, 1925; Germany-Estonia, 1925.

25. This phrase was first introduced in the unratified Taft treaties with Great Britain and France, 1911. The use of the term "equity" has been criticized. This term is known only to Anglo-American law, and even there variously interpreted. It is used, nevertheless, in the Kellogg treaties.

ternational law." Customary international law still offers a wide range for conflicting interpretations. Two remedies have been suggested—the gradual inclusion of controversial subjects within the network of written international law, by means of treaties and agreements, and the gradual codification of international law, which would begin with subjects already a part of written international law, and would attempt to secure a consensus of opinion on matters still in controversy. It is significant that the Pan American Conferences have devoted a good deal of attention to the proposed codification of international law.[26]

Disputes concerning the interpretation of treaties are now generally considered susceptible of submission to arbitration.[27] All Latin American treaties establishing boundaries provide for the arbitration of differences which may arise regarding the interpretation and execution of the treaties.

Certain matters on which a consensus of opinion has been reached, such as diplomatic and consular privileges, the right of navigation, etc., have been specifically named as falling within the range of arbitration.[28]

Differences as to facts—such as unneutral acts, injuries to aliens or their property—which facts, if established, would constitute a breach of an international obligation, and the nature and extent of the reparation to be made for it, are usually submitted to arbitration. In such cases, the rights of private citizens are involved, and the State appears only on behalf of its citizens. The task of the tribunal in such cases is to determine the liability of the offending party and the amount of the indemnity to be paid by it. In the field of private pecuniary claims arbitral tribunals and claims commissions have succeeded in building up a body of comprehensive decisions which constitutes a significant contribution to written international law.

26. The term "American international law," employed at earlier Pan American conferences has been criticized as self-contradictory. It was abandoned at the Havana Conference.

27. Projects of the First and Second Pan American Conferences. Disputes concerning the interpretation of treaties lie also within the jurisdiction of the Permanent Court of International Justice, Statute of the Court, Article 36.

28. Projects of the First and Second Pan American Conferences. Such disputes lie also within the jurisdiction of the Permanent Court of International Justice.

DISPUTES SUITABLE FOR ARBITRATION

It will be seen, from this brief survey, that three categories of differences have generally been considered suitable for arbitration: (1) differences which involve the interpretation of written international law, particularly as embodied in treaties; (2) differences with regard to matters on which a consensus of opinion has been reached through long continued practice, such as diplomatic privileges; and (3) private pecuniary claims. Questions suitable for arbitration, said Mr. Kellogg, speaking before the Council on Foreign Relations, March 15, 1928,

> "are exactly the same kind of questions as can be arbitrated between citizens of the United States or submitted to the decision of a local court under our form of government, that is to say, they are questions arising under contract or under the law of the land. Applying this analogy in international relations, we find that the questions which are susceptible of arbitration or impartial decision are those involving rights claimed under a treaty or under international law."[29]

It is customary in arbitration treaties, first to state that "legal" or "juridical" disputes are to be submitted to arbitration, and then to list disputes which are excepted from this provision. This phraseology seems misleading. As a matter of fact, the disputes excepted are not "legal" in nature. They may be described as "political" or "non-legal" in nature, and may be defined as "those due to a divergence of view between the political interests and aspirations of the parties."[30]

The differences which are usually reserved from arbitration are those which affect:

1. "Vital interests, national honor and independence;"
2. The interests of third States;
3. The domestic jurisdiction or domestic legislation of the parties;
4. The constitutional principles of the parties;
5. Cases of denial of justice; and
6. Special political interests such as the Monroe Doctrine and the obligations of the members of the League of Nations under the Covenant.

29. *The War Prevention Policy of the United States. Foreign Affairs, Special Supplement*, Vol. 6, No. 3, IV-V.

30. Memorandum on Arbitration and Conciliation, submitted by M. Holsti, Rapporteur, Committee on Arbitration and Security, League of Nations, Geneva, February, 1928, p. 8.

The phrase "vital interests, national honor and independence"[31] has been criticized as vague. Several post-war European treaties which except from arbitration controversies affecting "independence" or "vital interests of the highest importance"[32] attempt to limit the application of these phrases by providing that both parties must agree that the dispute falls into this category before arbitration is dispensed with.[33]

Disputes affecting the interests of third States are usually excepted from arbitration. Such controversies are excepted from arbitration in the treaty between France and the United States, 1928. The number of bilateral and multilateral treaties now in existence leave few matters in which it may not be claimed that the interests of third States are involved. A number of post-war European treaties specifically strike out this reservation, and provide for a special procedure in disputes affecting the interests of third States.[34]

"DOMESTIC QUESTIONS"

A new phrase, providing for the exception from arbitration of disputes affecting the "domestic legislation" or "domestic jurisdiction" of the parties appears in post-war treaties. It seems to take the place of the "vital interests, national honor and independence" phrase. "It is a common process in human affairs," says Professor Hudson, "to throw away an expression which has acquired an unpleasant 'psychic fringe,' and to substitute a new expression of similar content."[35] The treaty between Estonia, Latvia, Finland and Poland, 1925, provides that "questions the legal nature of which makes them subject solely to the domestic legislation of the Party concerned" are to be excepted from submission to arbitration and conciliation. The treaty between the United States and France, 1928, provides for the exception from arbitration of any dispute the subject matter of which "is within the domestic jurisdiction of either of the High Contracting Parties." Several European treaties contain the provision that "questions which, according to international law, come within the exclusive competence of individual States," are not to be submitted to arbitration or conciliation.[36]

The range of subjects which normally fall within the domestic jurisdiction of the State, and may yet possess an international character, is very wide. Immigration, the exclusion or admission of aliens; the tenure of land in so far as it affects aliens; the admission of aliens to educational institutions—these are a few of the subjects on which the State has the right to legislate and over which it has jurisdiction; yet legislation on these matters, and exercise of jurisdiction by the State, may involve it in controversies with other States.

Article XV, Paragraph 8 of the Covenant of the League of Nations provides that "if the dispute between the parties is claimed by one of them, and is found by the Council to arise out of a matter which *by international law is solely within the domestic jurisdiction of that Party*, the Council shall so report, and shall make no recommendation as to its settlement." No attempt was made at the time to define the sphere of domestic jurisdiction. The Permanent Court of International Justice, in an advisory opinion, has since stated that "the words 'solely within the domestic jurisdiction' seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle, regulated by international law."[37] However, in a matter which is not in prin-

31. It first occurs in the treaty between France and Great Britain, 1903.

32. Germany-Switzerland, 1921; Hungary-Switzerland, 1921; Germany-Sweden, 1924; Germany-Finland, 1925; Germany-Estonia, 1925.

33. If the opposing party agrees that the dispute is one which affects the independence or vital interests of the other party, the dispute is to be submitted to conciliation.

34. Germany-Switzerland, 1921, Final Protocol, Par. 3: "The treaty shall not cease to be applicable if a third State is concerned in a dispute. The Contracting Parties shall endeavor, if necessary, to induce the third State to agree to refer the dispute to arbitration or conciliation. In this case the two Governments may, if they so desire, jointly provide that the Tribunal or Permanent Board of Conciliation shall be composed of members specially chosen for the case. If no agreement is reached with the third State within a reasonable period, the Contracting Parties shall proceed with the case in accordance with the provisions of the Treaty." A similar provision is found in the following treaties: Germany-Sweden, 1924; Germany-Finland, 1925; France-Rumania, 1926; Germany-Denmark, 1926; Germany-Estonia, 1925; Germany-Netherlands, 1926; Denmark-Czechoslovakia, 1926; Denmark-Lithuania, 1926. The "model" treaties of the League of Nations make a similar provision.

35. Hudson, M. O. *The New Arbitration Treaty with France*, 22 *American Journal of International Law*, (1928), p. 368.

36. Poland-Switzerland, 1925; Poland-Sweden, 1925; Austria-Poland, 1926. A reservation as to "questions governed by internal legislation" is possible under the "model" conventions of the League of Nations.

37. Advisory Opinion No. 4, *Nationality Decrees in Tunis and Morocco*, Publications of the Permanent Court of International Justice, Series B, p. 23-24.

ciple regulated by international law, the right of a State to use its discretion is limited by the obligations it may have undertaken towards other States. For example, naturalization is at present considered to be solely within the domestic jurisdiction of each State; however, the fact that a given State is party to a naturalization treaty limits the exercise by it of jurisdiction in this matter.

A large number of Latin American treaties provide for the exception from arbitration of the constitutional principles (or provisions) in force in either of the contracting States.[38] The Alfaro project provides for exclusion from arbitration of those controversies "which involve constitutional provisions in one or the other State party to the controversy." Mr. Hughes, examining the project, stated that "from the standpoint of the United States there are few questions that could not be claimed to involve constitutional provisions, if you say that all the powers and functions for which the Constitution provides are the subject of exception."[39]

The fundamental provisions made by the constitution of a State concerning the form of its government and the methods to be followed in altering it seem to be clearly excepted from arbitration, although an international tribunal may find it necessary to examine the constitutional arrangements of a given State in order to determine its liability, especially as regards private pecuniary claims. A number of Latin American constitutions, however, contain provisions on subjects usually left in other States to ordinary legislation. The Argentine Constitution regulates the acquisition of nationality;[40] the Mexican Constitution of 1917 contains provisions with regard to the ownership of sub-soil rights. These provisions may, when applied, so affect the rights of aliens as to be made the basis of private claims.

38. Argentina-Uruguay, 1899; Argentina-Paraguay, 1899; Argentina-Bolivia, 1902; Argentina-Chile, 1902; Argentina-Brazil, 1905; Argentina-Venezuela, 1911; Argentina-Ecuador, 1911; Argentina-Colombia, 1912; Peru-Venezuela, 1912; Brazil-Switzerland, 1924. Cf. Appendix for treaties with European States.

39. Report of the Delegates of the United States of America, p. 22-23.

40. The treaty between Argentina and Ecuador, 1911, specifically provides for the exception of nationality questions from arbitration.

"DENIAL OF JUSTICE"

Several Latin American treaties provide for the exception from arbitration of cases of denial of justice.[41] The term "denial of justice" has never been authoritatively defined. As a general rule, local remedies must be exhausted before it can be claimed that justice has been denied.[42] In certain States, however, the administration of justice is so backward, according to European and American standards, that "local remedies" are no more than a travesty of justice. As a result, diplomatic intervention has been frequent in these States. The Latin American States have particularly suffered in the past from divergence in standards of justice. In self-protection they either exclude "denial of justice" from arbitration, or include in their constitutions a definition of the term "denial of justice."

The submission to arbitration of cases involving denial of justice, alleged or real, would have the practical advantage of permitting arbitral tribunals, in successive awards, to establish a definition of denial of justice which might be generally acceptable. This is at present precluded by Latin American treaties excluding denial of justice from arbitration, and by the definition of the term in the constitutions of certain Latin American States which reserve constitutional provisions from arbitration.

Special political interests have been reserved from arbitration. The United States, at the Hague Conferences, 1899 and 1907, stated that nothing contained in the convention for the pacific settlement of disputes was to be "construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions." Article III of the treaty between the United States and France, 1928, withholds from arbitration disputes the sub-

41. Spain-Uruguay, 1922; Uruguay-Venezuela, 1923; (both these treaties provide that "nevertheless, the question whether a case of denial of justice has occurred may be made the subject of arbitration"). The treaty between Argentina and Venezuela, 1911, provides "for the exception from arbitration of disputes which, according to the laws of the country, should be settled by judges and courts appointed under those laws."

42. Argentina made the following reservation to the Hague Convention of 1907 regarding the recovery of debts: "With regard to debts arising from ordinary contracts between the citizen or subject of a nation and a foreign government, recourse shall not be had to arbitration except in the specific case of denial of justice by the courts of the country which made the contract; the remedies before which courts must first have been exhausted." Several Latin American and post-war European treaties provide that the local remedies must be exhausted before recourse is had to arbitration.

ject matter of which "depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine." The Covenant of the League of Nations recognizes the validity of the Monroe Doctrine as a "regional understanding for securing the maintenance of peace." The Council, when requested by Costa Rica in September 1928, to give an interpretation of the Monroe Doctrine, declined to interpret the doctrine on the ground that it concerned only the states which have accepted such engagements *inter se*. It pointed out, further, that the reference made to the Monroe Doctrine in the Covenant does not give it a sanction or a validity which it did not previously possess.

It is reported that Japan wishes to except from the arbitration treaty now pending between it and the United States disputes which may arise concerning China, as a counterpart to the proposed American reservation regarding the Monroe Doctrine.[43]

Will the United States, at the forthcoming conference on arbitration and conciliation, attempt to exclude the Monroe Doctrine from arbitration? Or will this exception be employed only in its treaties with non-American States?

The treaty between the United States and France, 1928, provides for the exception from arbitration of disputes the subject matter of which "depends upon or involves the observance of the obligations of France in accordance with the Covenant of the League of Nations." The United States not being a party to the Covenant, it is natural that the members of the League of Nations should make this reservation.[44] Will the Latin American States, members of the League, decide to follow suit?

LIMITATIONS OF ARBITRATION

It will be seen that the differences generally considered unsuitable for arbitration are those to which no rule of international law is at present applicable. As Mr. Kellogg said:

> "A political question cannot be arbitrated because there are no principles of law by which it can be decided, and unless there are relevant treaty provisions requiring construction, no nation can agree to arbitrate purely domestic questions like tariff, taxation, immigration, and, it may be said, all political questions involving the exercise of sovereignty within the nation's territorial limits. There are no positive rules of international law applicable to such questions to guide arbitrators in reaching a decision.
>
> "I am confident that the enthusiastic supporters of the theory that all questions between nations should be submitted to arbitration have not realized the vital difference between justiciable and political questions. Take, for example, the question of immigration which at times arouses bitter feelings between nations. On what principle could a government arbitrate this question, and what rules could be applied to guarantee justice to the disputants?"

The fact, now generally recognized, that not all disputes are suitable for arbitration, is in no way indicative of the failure of arbitration. The post-war European treaties are framed on the theory that the acceptance of a more or less comprehensive obligation to arbitrate is not indispensable. The acceptance of such an obligation at the present time is considered difficult, in view of the diverse circumstances of the several States, and of the fact that it is not yet possible to treat all disputes as if they stood on the same legal basis.[45] What then, is to be done with disputes reserved from arbitration?

> "Non-justiciable or political questions," says Mr. Kellogg, "must, if they threaten to bring on hostilities, be adjusted through other means, such as conciliation, where a disinterested effort is made to reconcile conflicting points of view without finding necessarily that either party was in the wrong."

The present tendency is in favor, not of the submission of all disputes to arbitration, but of the application of some specific procedure to every dispute.

43. The *Japan Weekly Chronicle*, August 16, 1928, p. 222.

44. The Locarno treaties provide that they in no way affect the rights and obligations of the parties as members of the League of Nations.

45. Memorandum on Arbitration and Conciliation, submitted by M. Holsti, Rapporteur, Committee on Arbitration and Security, Geneva, February, 1928, p. 8.

THE PROCEDURE AND SCOPE OF CONCILIATION

What is the present status of conciliation? In what respects is its procedure an improvement on that of arbitration? To what extent does it fill in the gaps left by arbitration? The answers to these questions must be sought in the conciliation treaties in force in Europe and on the American continent.

THE PROCEDURE OF CONCILIATION

The procedure of conciliation consists in the investigation by an independent commission of the facts in dispute and in a report of the investigation, which may or may not contain proposals for a settlement. The functions of conciliation are entrusted to conciliation commissions and commissions of inquiry.

The commissions may be permanent as to membership, or they may be formed *ad hoc* as each case arises. The Bryan treaties provide for the establishment of permanent commissions. Permanent conciliation commissions have been established under the terms of the majority of post-war European treaties. The Hague Convention, 1907, and the Gondra treaty, 1923, provide for *ad hoc* commissions of inquiry. The Central American Convention, 1923, provides for the creation of a panel from which members are to be selected to serve on commissions of inquiry in each case. The advantage of permanent commissions is that questions may be referred to them without the formality of choosing individuals to serve on them each time a dispute arises. Permanent commissions, in order to retain their value, must always be kept in working order; vacancies must be filled as they occur.

Disputes may be submitted to conciliation in any one of several ways. The Hague Convention, 1907, provides for the conclusion by the parties of an agreement, similar to the *compromis*, specifying the facts which are to be examined.[46] The Bryan treaties provide for the immediate submission of the dispute by the parties; under some of these treaties[47] the commission may also act upon its own initiative, and in such cases it shall notify both governments and request their cooperation in the investigation. The Central American Convention, 1923, provides for the conclusion by the parties of a protocol, in which the question or questions of fact which it is desired to elucidate are to be stated. Should the parties fail to reach an agreement, the commission is to proceed with the investigation,[48] taking as a basis the diplomatic correspondence upon the matter, which has passed between the parties. The Gondra treaty, 1923, provides for the creation of two permanent commissions, one at Montevideo and one at Washington, each of which is to be composed of three diplomatic agents. These commissions may receive from either one of the parties to a dispute the request for the convocation of the commission of inquiry, and to notify the other party immediately. The members of the commission of inquiry are to be appointed by the parties at the time of convocation. Once the commission of inquiry has been organized, the permanent diplomatic commission is to notify the parties of the date of inauguration.

The European treaties which institute the procedure of conciliation all agree in providing that the procedure may be set in motion by the will of a single party. As a general rule, the party which wishes to have recourse to conciliation is to address an application to that effect to the President of the conciliation commission. Three treaties permit the conciliation commission to offer its services to the parties.[49]

The conclusion of an agreement prior to the submission of a dispute to conciliation is required only under the terms of the Hague Convention, 1907, and the Central American Convention, 1923. The Bryan treaties and the post-war European treaties render the procedure of conciliation as free as possible of formalities.

46. The following matters have been referred to commissions of inquiry under the terms of the Hague Convention: the Dogger Bank incident, reported in 1905; the matters of the *Tavignano*, *Kamouna* and *Gaulois*, 1912; the loss of the *S.S. Tubantia*, 1922.

47. Bolivia, Costa Rica, Guatemala, Honduras, Peru, Uruguay, Venezuela.

48. Article I of the Convention provides: "A Commission of Inquiry shall not be formed except at the request of one of the Parties directly interested in the investigation of the facts which it is sought to elucidate." No provision, however, is made for the formation of a commission, except by means of the protocol. This gap in the Convention appears to be due to faulty drafting.

49. Chile-Sweden, 1920; Spain-Switzerland, 1926; Denmark-Poland, 1926.

The parties are free to accept or reject the findings of the commission when submitted in the form of a report or of proposals for a settlement. The findings of the commission have not the force of judicial decisions or arbitral awards. This is of the essence of conciliation.

> "The object which is sought to be attained by conciliation treaties," said Mr. Kellogg, "is the preservation of peace, and in my opinion any government can well afford to submit to inquiry any question which may threaten to involve it in the horrors of war, particularly when, as in the Bryan and other treaties I have just mentioned, the findings of the commission have no binding force and to be effective must be voluntarily accepted."

The fact that the report of the commission is not binding is regarded as one of the chief reasons why States have been willing to submit to conciliation disputes which they have reserved from arbitration.

THE SCOPE OF CONCILIATION

What is, at present, the scope of conciliation? Are all the disputes reserved from arbitration considered suitable for conciliation?

The Hague Convention of 1907 provides for the submission of disputes "arising from a difference of opinion on points of fact" to a commission of inquiry; disputes involving honor or vital interests are excluded. The Bryan treaties provide for the submission of all disputes, of every nature whatsoever, which diplomacy shall fail to adjust, to international commissions for investigation and report. Questions affecting sovereignty, independence, honor and vital interests are excepted by the Central American Convention, 1923, from submission to commissions of inquiry. The Gondra treaty, 1923, excludes questions affecting the constitutions of the parties having no general arbitration treaties from submission to commissions of inquiry.

It will be noted that the bilateral Bryan treaties are broader in scope than the later multilateral Central American and Gondra treaties. What is the relation between them? Three states, Costa Rica, Guatemala and Honduras, are parties both to the Central American Convention and to Bryan treaties.[50] Six States, Brazil, Chile, Ecuador, Paraguay, Uruguay and Venezuela are parties both to the Gondra treaty and to Bryan treaties. No disputes have been submitted to conciliation under the terms of any one of these treaties. Should a dispute arise between the United States and one of the States parties both to a Bryan treaty and to either the Central American Convention or the Gondra treaty—which of the treaties will apply? According to the preamble, the Central American Convention, 1923, is intended to "unify and recast in one single convention" the Bryan treaties existing between the United States and the Central American republics. The convention of 1923 would then, it seems, prevail over the Bryan treaties. The Gondra treaty provides (Article VIII) that "the present treaty does not abrogate analogous conventions which may exist or may in the future exist between two or more of the High Contracting Parties, neither does it partially abrogate any of their provisions, although they may provide special circumstances or conditions differing from those herein stipulated." This provision may be interpreted to mean that the Bryan treaties are to prevail over the Gondra treaty.

A number of post-war European treaties except from conciliation questions involving territorial integrity, or territorial status; disputes arising out of the war; questions affecting domestic legislation, and, in one instance, questions affecting the constitution. Nevertheless, vital interests and independence, honor, the interests of third States and questions affecting the jurisdiction of the national courts are not reserved from submission to conciliation by any one of the post-war European treaties.

The "model" conventions of the League of Nations provide for the submission of all "non-legal" disputes to conciliation. The reservations which may be made to arbitration are not to apply to conciliation, unless there is a provision to the contrary.

The scope of conciliation is narrowest under the Hague Convention, 1907, and the Central American Treaty, 1923, which make reservations similar to those found in the

50. The Bryan treaties with Nicaragua and Salvador are not in force, as they were never ratified by these States.

majority of arbitration treaties. It is broadest under the Bryan and the Locarno treaties. The present tendency is in favor of the unrestricted application of the procedure of conciliation to all "non-legal" disputes.

Neither arbitration nor conciliation can at present be discussed alone. A close coordination of the two in practice, as well as in principle, is now considered necessary for the effective solution of international conflicts.

THE TASK OF THE CONFERENCE

In the light of the above analyses, what may be said to be the problems which confront the Washington Conference? On what matters will it be necessary for it to reach a decision?

1. *The Scope of Arbitration and Conciliation.*

The resolution adopted at the Havana Conference declares that the American Republics "adopt obligatory arbitration as the means for the pacific solution of their international differences of a juridical character." The forthcoming conference is expected to "give conventional form to the realization of this principle, with the minimum exceptions" which it may consider "indispensable to safeguard the independence and sovereignty of the States, as well as matters of domestic concern, and to the exclusion also of matters involving the interest or referring to the action of a State not a party to the convention."

It would appear from the terms of the resolution that the contemplated convention is to follow the familiar plan of declaring one category of disputes, described as "juridical," suitable for arbitration, but of making certain exceptions to this category. As a matter of fact, the customary exceptions, such as sovereignty, independence, etc., appear to be "non-juridical," and "political" in nature; to name them as exceptions to the category of "juridical" disputes appears to be a misuse of terms. To provide for the submission to arbitration of "juridical" disputes only, leaving disputes now considered "non-juridical" to other means of pacific settlement, would seem to be more in consonance with the present state of international relations. It must be pointed out that the Havana resolution looks to a gradual enlargement of the category of "juridical" disputes. It provides that "the convention or conventions of conciliation and arbitration which may be concluded should leave open a protocol for progressive arbitration which would permit the development of this beneficent institution up to its maximum." Presumably the progress envisaged by the resolution will depend on the gradual transference of disputes now considered "non-juridical" into the category of "juridical" ones, by means of treaties or of codification.

It may be found possible, then, to draw up one convention providing for the submission of "juridical" disputes to arbitration, and of "non-juridical" disputes to conciliation, following the plan of the "model" conventions recommended by the League of Nations. Decision as to the category in which a given dispute belongs would still rest with the parties to the dispute, unless provision is made for referring this question to an international tribunal.

The arbitration of private pecuniary claims, which form so important an item in the relations between the United States and Latin American States, was made the subject of a special convention in 1902. This convention is defective in that it provides for the conclusion of a *compromis* before resort can be made to arbitration. The establishment of a standing commission which might take jurisdiction over cases as they arise has been suggested as a remedy. Plans for the establishment of such a commission would come within the scope of the work of the conference.

2. *An Arbitral Tribunal.*

The conference will have to reach a decision with regard to the tribunal to which disputes will be submitted for arbitration. The Alfaro project suggests four general types of tribunals: (1) tribunals selected by the parties, and composed of one or more arbitrators; (2) the Permanent Court of Arbitration at the Hague; (3) the Permanent Court of International Justice at the

Hague; and (4) the Pan American Court of International Justice, "provided such court be established."

The establishment of a Pan American Court of International Justice has been advocated on the ground that a body of law has been developed on this continent to meet special American needs, and that a special tribunal is required to administer it.[51] The establishment of a regional tribunal would not conflict with the engagements of the Latin American States under the Covenant of the League of Nations. The spirit of the Covenant favors pacific settlement, by whatever methods it may be achieved. It is expected that a permanent arbitral tribunal established on this continent would fit as easily within the framework of the Covenant as the regional permanent conciliation commissions established in Europe.

The establishment of such a tribunal has been opposed on the ground that the selection of judges would be difficult, if not impossible; that the necessary machinery is already available in the Permanent Court of International Justice; and that it is desirable to achieve uniformity in the principles and application of international law. It has been suggested that the Permanent Court of International Justice might be able to hold two regular sessions a year, one in Europe, at the Hague, and one in America, at Havana.[52]

3. The Machinery of Conciliation.

It is expected that the conference will also consider the establishment of effective means of conciliation. The existing Bryan commissions provide an excellent basis for constructive work in this direction. The commissions of inquiry provided for by the Central American convention and the Gondra treaty, 1923, are less advanced both as to jurisdiction and procedure. It appears to be necessary to coordinate the several treaties, so as to leave no gaps in conciliation procedure on the American continent.

The forthcoming conference has before it, for guidance and reference, the recent achievements in arbitration and conciliation in Europe as well as on this continent. A sympathetic understanding of modern tendencies in arbitration and conciliation, and a full utilization of existing machinery for the pacific settlement of international disputes are essential to constructive achievements on the part of the conference.

51. Alvarez, A. *Latin America and International Law*, 3 American Journal of International Law. (1909), p. 269.

52. Bustamante, A. S. de. *The World Court*, New York, 1925, p. 319.

APPENDIX

Pacific Settlement of International Disputes

TABLE A

MACHINERY AVAILABLE TO THE LATIN AMERICAN STATES

Central and South American States (and the United States).
Permanent commissions of inquiry. (Bilateral Bryan treaties, 1913-1914, with Bolivia, Brazil, Chile, Costa Rica, Ecuador, Guatemala, Honduras, Paraguay, Peru, Uruguay, and Venezuela; *all disputes, of any nature whatsover;* the parties agree not to resort to war during the investigation and report).*

Central American States (and the United States).
Ad hoc commissions of inquiry. (Multilateral treaty, 1923, signed and ratified by Costa Rica, Guatemala, Honduras, Nicaragua, Salvador and the United States; disputes affecting *sovereignty, independence, vital interests* and *national honor* excepted; matters to remain in the same state pending the report by the Commission).

Central and South American States (and the United States).
Ad hoc commissions of inquiry. (Multilateral Gondra treaty, 1923, signed by Argentina, Brazil, Chile, Colombia, Cuba, the Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, the United States, Uruguay and Venezuela; ratified by Brazil, Chile, Costa Rica, Cuba, Guatemala, Haiti, Uruguay, Paraguay, Panama, Venezuela, and the United States; adhered to by Bolivia, Mexico and Peru; disputes affecting *the constitutions of the parties having no general treaties of arbitration* excepted); the parties agree not to resort to war during the investigation and report).

*All these treaties have been ratified.

II. Conciliation Commissions

Brazil-Great Britain, 1919.
(The parties agree not to declare war until the result of the investigation is submitted).
Chile-Sweden, 1920.
Sweden-Uruguay, 1923.

} any disputes whatsoever to be submitted to permanent conciliation commissions.

III. Arbitration

Central and South American States (and the United States).
Permanent Court of Arbitration at The Hague. (Multilateral convention, 1907, which Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, the Dominican Republic, Ecuador, Guatemala, Haiti, Mexico, Panama, Paraguay, Peru, Salvador, the United States, Uruguay and Venezuela have signed and Bolivia, Brazil, Cuba, Guatemala, Haiti, Mexico, Paraguay, Salvador and the United States have ratified. Nicaragua has adhered to it. Costa Rica and Honduras have not signed the convention.
"In questions of *a legal nature,* and especially in *the interpretation or application of international conventions,* arbitration is recognized by the contracting Powers as the most effective, and at the same time, the most equitable means of settling disputes which diplomacy has failed to settle."

Central American States
International Central American Court. (Multilateral treaty, 1923, signed by Costa Rica, Guatemala, Honduras, Nicaragua and Salvador; disputes affecting *sovereignty and independence* excepted).

IV. Judicial Settlement

Permanent Court of International Justice at The Hague, established in 1920.
Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Guatemala, Haiti, Panama, Paraguay, Salvador, Uruguay and Venezuela have signed the Protocol of Signature of the Statute of the Court. Brazil, Chile, Cuba, Haiti, Uruguay and Venezuela have ratified it.
Brazil, Costa Rica, the Dominican Republic, Guatemala, Panama, Salvador and Uruguay have signed the optional clause of the Protocl of the Court regarding compulsory jurisdiction, on condition of reciprocity, but have not yet ratified it.
Haiti has signed the clause unconditionally and has ratified it.
Brazil has a treaty with Switzerland, 1924, providing for the submission of all disputes, except those involving constitutional provisions, to the Permanent Court of International Justice.

V. Conciliation by the Council

(Under Article XV of the League of Nations)
All the Latin American states, except Ecuador and Mexico are parties to the Covenant; Brazil has withdrawn from membership in the League; Costa Rica, which had withdrawn, is now being reinstated.

TABLE B

SCOPE OF LATIN AMERICAN ARBITRATION TREATIES

I. *Treaties which except no disputes whatsoever from arbitration.*

Colombia-Salvador, 1880.
Dominican Republic-Salvador, 1882.
Bolivia-Peru, 1901.
Bolivia-Ecuador, 1911.
Brazil-Uruguay, 1916.
Bolivia-Uruguay, 1917.
Peru-Uruguay, 1917.
Brazil-Peru, 1918.
Bolivia-Colombia, 1918.
Bolivia-Venezuela, 1919.
Uruguay-Venezuela, 1923.

II. *Treaties which except from arbitration disputes affecting vital interests, independence, sovereignty, national honor, or the interests of third states.*

Brazil-United States, 1909.
Ecuador-United States, 1909.
Haiti-United States, 1909.
Peru-United States, 1908.
Uruguay-United States, 1909.
} Root treaties.

Bolivia-Brazil, 1909.
Brazil-Peru, 1909.
Brazil-Mexico, 1909.
Brazil-Honduras, 1909.
Brazil-Venezuela, 1909.
Brazil-Ecuador, 1909.
Brazil-Costa Rica, 1909.
Brazil-Cuba, 1909.
Brazil-Salvador, 1909.
Brazil-Haiti, 1910.
Brazil-Dominican Republic, 1910.
Brazil-Paraguay, 1911.

III. *Treaties which except from arbitration disputes affecting independence, national honor or vital interests, but exclude from these exceptions pecuniary claims, controversies arising therefrom and cases involving a denial of justice.*

Ecuador-Venezuela, 1921.
Peru-Venezuela, 1923.

IV. *Treaties which except from arbitration disputes affecting territorial integrity.*

Bolivia-Brazil, 1909.
Brazil-Peru, 1909.
Brazil-Paraguay, 1911.
Ecuador-Venezuela, 1921.
Peru-Venezuela, 1923.

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